

In re Appln. Of Timothy Charles Sowell
Application Number: 09/418,943

(3) *Status of Claims*

Claims 1-12, 14-44, 53-55 and 74-77 are pending in this application, and *all are appealed*.

Claims 45-52 and 56-73 were previously withdrawn from consideration in response to a restriction requirement. Claim 13 was previously deleted.

Pending claims 41, 54 and 55 were last amended in Appellant's Amendment dated November 5, 2001.

Pending claims 1, 16, 31, 33, 34, 42, and 53 were last amended and claims 74-77 were added in Appellant's Amendment dated August 5, 2002.

(4) *Status of Amendments*

No further amendments have been submitted in association with this appeal.

(5) *Summary of Invention*

The appealed claims of the present invention generally relate to methods and a software module structure that facilitate charging customers for use of software modules distributed to the customers' sites. Claims 53-55 are directed to a particular arrangement of program/data within a software module that facilitate executing the claimed use-based methods for charging customers for using distributed software modules containing an object from which instantiated objects are rendered.

In accordance with claim 1, corresponding generally to the steps summarized in FIG. 7, a method for charging customers for using software object instances is recited. A use-based pricing scheme is established (e.g., step 100 described at page 19). Thereafter, a set of software modules, including at least one object class, are distributed to customers (e.g., steps 102 and 104 described at pages 19 and 20). The software on the users' systems monitor usage of the software by the users (e.g., step 112 described at pages 21-23). The monitoring step, as well as the preceding steps, contain detailed examples of creating object instances, monitoring use of the object instances created from an object class (e.g., step 110 described at page 21), and thereafter charging customers (e.g., step 112 where credits are deducted from previously purchased credits stored in customer account during step 108) based upon the monitored usage of the object instances.

With regard to claim 2, multiple instances are created from the software module (containing an object class), and use of the software is measured according to detected

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instances during the monitoring step (see, e.g., step 112, "daily" and "lifetime" modes described at page 22).

With regard to claim 3, the use is periodically monitored (e.g., repetition of steps 112 and 114 described at pages 22 and 23).

With regard to claims 4 and 36, usage is measured by each day that an object instance is active and a user is charged a daily rate (e.g., "daily" usage described at page 22, lines 10-18).

With regard to claim 5, a demonstration mode is provided wherein object instances are executable free of charge (e.g., step 106 described at page 20, lines 20-25).

With regard to claim 6, the claimed method includes maintaining a single agreement governing use of the object instances created from the set of software modules for an enterprise (e.g., step 110, described at page 21).

With regard to claim 7, termination dates of time-limited object instances are monitored (e.g., step 106, at page 20, line 28 to page 21, line 2).

With regard to claims 8, 26, and 41, upcoming expiration dates of object instances are monitored and warnings are issued (see, e.g., page 9, lines 20-23; page 15, lines 18-20).

With regard to claim 9, the claimed method includes maintaining an account of credit units and during the charging step, the account credits are decremented based upon the monitoring step (e.g., step 112 described at page 21, lines 23-27).

With regard to claim 10, a report is generated summarizing use of software modules at the customer site (e.g., step 114 described at page 23, lines 8-10).

With regard to claim 11, charging is based upon registered uses of a software module (see, step 112 described at page 22, line 29 to page 23, line 4).

With regard to claims 12 and 32 use is measured according to *execution* of created instances (e.g., daily usage mode described in step 112 described at page 22, lines 10-28).

With regard to claim 14, the software module is an object class for creating an application engine object (e.g., page 24, lines 22-27).

With regard to claim 15, the software module is an object class for creating a view engine object (e.g., page 22, lines 12-15).

With regard to claim 16, the monitoring step (112) determines a time duration that an object instantiated from a software module is active (see, demo mode described at page 22, lines 24-26).

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With regard to claims 17, 34, and 77 the monitoring step comprises registering execution of an instance that tracks throughput of a process (see, page 18, lines 9-14).

With regard to claim 18, individual ones of the set of software modules are individually priced (see, Fig. 6, fields 92 and 94, described at page 18, lines 1-18).

With regard to claim 19, the set of software modules includes at least a first software module supplied by a third party vendor and the method further comprises compensating a third party vendor based upon a use by a customer of the first software module determined during the monitoring step (see, step 114 described at page 23, lines 11-16).

With regard to claims 20 and 21, the software modules are transmitted via a network, and more particular an Internet, connection (see, distribution function 22, at page 8, lines 24-27 and steps 102 and 104 of FIG. 7).

With regard to claim 22, usage information is reported to a software brokerage facility. (see, e.g., licensing function 24, at page 8 line 28 to page 9, line 2 and brokerage 10 described at page 10, lines 21-23).

With regard to claim 23, reporting includes identifying a location of an instance (see, page 15, lines 8-11).

With regard to claim 24, a failure by a license manager to report to a software brokerage facility is detected, and in response a communication failure is recorded at a central licensing facility (see, page 14, lines 26-30).

With regard to claim 25, monitoring includes storing use information in summary format in a database (see, step 112 and usage register 76 described at page 21, lines 23-30).

With regard to claims 27, 28, and 40 the software modules relate to industrial manufacturing automation/information software (see, e.g., process control (automation) objects and process data viewing (information) objects described in FIG. 8, page 11, line 28 to page 12, line 4; page 18, lines 6-15).

With regard to claim 29, an agreement is maintained for governing use of instances created from the set of software modules for an enterprise wherein the instances comprise both lifetime billed and use-based billed instances (see, page 19, lines 7-10; and page 22, lines 10-28).

With regard to claim 30, configuration tools are provided that enable a user to create customized instances from the software modules (see, page 20, lines 4-8).

Claim 31 recites a method for vending software in the form of software modules via electronic commerce channels. The recited method includes maintaining an electronic

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commerce site including a software module selection interface that enables a customer to request a software module for use at a customer site, wherein the software module comprises at least one object class from which objects are instantiated on a customer system. (See, step 102 described at the bottom of page 19). A software module management framework is provided to the customer for installation at a customer site, wherein the management framework includes components for registering use of the software module at the customer site (see, the license manager 66 described at page 14, lines 15-28). Thereafter, the customer is charged based upon registered use of software modules, wherein software module usage is measured according to object instances created from the at least one object class (e.g., step 112, described on page 21, line 23 to page 23, line 4, where credits are deducted from previously purchased credits stored in customer account during step 108).

With regard to claims 33, 74, 75 and 76 usage of the software is based upon detecting *creation* of instances of an object at the user's site during the monitoring step (e.g., step 112, see "lifetime mode" described at page 22).

With regard to claim 35, the module management framework (e.g., license manager 66) supports creation of instances from software modules at the customer site having differing use modes including at least: a lifetime mode and a use-based mode, and wherein said method comprises the further step of registering execution of instances operating in the use-based mode (see, e.g., step 112 described at pages 21-23).

With regard to claim 36, usage is measured in days, and an instance operating in use-based mode is registered each day in which the instance is executed (see, step 112 at page 22, lines 10-18).

Claim 37 recites a method for charging customers for use of software. The method includes the step of providing a set of individually identifiable units of software including at least one object class from which objects are instantiated on a customer system (e.g., steps 102 and 104 described at pages 19 and 20). The downloaded units are individually priced (see, description of modules provided in FIG. 5, including daily 92 and lifetime 94 rate fields). Authorizing use of the executable software is performed (e.g., installing a licensing agreement described at step 110 described at page 21, lines 14-22). Thereafter, a customer is charged (e.g., step 112 where credits are deducted from previously purchased credits stored in customer account during step 108) based upon use of selected ones of the set of individually identifiable units of software, and software usage is measured according to object instances created from the at least one object class.

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With regard to claim 38, the authorizing step comprises transmitting a license file containing code enabling use by the customer of the executable software (see, page 16, line 27 to page 17, line 3).

With regard to claim 39, the method further includes integrating self-monitoring process software (see, page 18, lines 1-20) within the executable software, and registering use of the executable software by the self-monitoring process (e.g., description of step 112 at page 22, lines 3-28).

Claim 42 recites a method for charging customers for use of software. The method includes first providing a set of software modules for software customers, wherein the set of software modules comprise at least one object class from which objects are instantiated on a customer system (e.g., steps 102 and 104 described at pages 19 and 20). Second a software licensing facility is provided that includes a brokering facility (software brokerage 10) through which software customers pay for software execution units, and wherein the brokering facility includes a set of software customer accounts (see, software brokerage 10 described at page 6, lines 7-30, page 10, lines 5-18). Customer accounts are charged a number of software execution value units based upon the value of software modules utilized by a customer (page 10, lines 5-18), and wherein software module usage is measured according to object instances created from the at least one object class (see, FIG. 7, described at pages 17-23 describing an "object-based" use charging scheme).

With regard to claim 43, customer charging is performed by an automated billing process (see, step 112 described at pages 21-23).

With regard to claim 44, an on-line customer interface provides an interface enabling users to download software modules from a remote location (see, e.g., page 8, lines 24-27, and page 19, line 19 to page 20, line 11).

With regard to claim 53, a memory containing a software module structure facilitating automated distribution of software to customers is described in FIG. 6 (see description of billed software modules 72 described at , page 17, line 16 to page 19, line 4). The recited software module structure includes a supplier identification (within vender details 86), a product description (within vender details 86 and module class field 88), a billing definition (usage rate 92, lifetime value 94); and an executable program module including at least one object class from which instantiated objects are rendered (data segment 98).

With regard to claim 54, the billing definition within the software module structure includes a usage rate (92), and with regard to claim 55, a lifetime rate (94).

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(6) *Issues*

The following general issues have been raised by the rejection of the above-summarized pending claims.

1. Whether claims 1-3, 5-7, 9-12, 14-25, 27-35, 37-40, 42-44, 53-55 and 74-77 are unpatentable under 35 U.S.C. §103(a) as obvious over Archibald et al. U.S. Pat. No. 5,825,883 in view of Knapton, III U.S. Pat. No. 6,363,486 and Sobeski, U.S. Pat. No. 6,499,035.

2. Whether claims 4, 8, 26, 36, and 41 are unpatentable under 35 U.S.C. §103(a) as obvious over Archibald et al. U.S. Pat. No. 5,825,883 in view of Knapton, III U.S. Pat. No. 6,363,486, Sobeski, U.S. Pat. No. 6,499,035, and Ahmad, U.S. Pat. No. 5,925,127.

(7) *Grouping of Claims*

The claims do not stand or fall together. Rather, each one stands or falls on its own for at least the reasons set forth herein below. However, for purposes of simplifying this appeal, the claims are grouped as follows for the argument set forth herein below:

- Group I: 1, 9-11, 18-22, 25, 29, 31, 35, 37, 39, 42, 43, and 44
- Group II: 2
- Group III: 3
- Group IV: 4, 36
- Group V: 5
- Group VI: 6
- Group VII: 7
- Group VIII: 8, 26, and 41
- Group IX: 12, 32, 33, 74-76
- Group X: 14
- Group XI: 15
- Group XII: 16
- Group XIII: 17, 34, 77
- Group XIV: 23
- Group XV: 24
- Group XVI: 27, 28, and 40
- Group XVII: 30

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Group XVIII: 38

Group XIX: 53-55

The large number of groups was necessitated by the absence of a number of recited claim elements that simply are not disclosed or even remotely suggested by the Archibald reference. The remaining claims cannot be grouped due to their separate grounds for patentability set forth herein below. Furthermore, notwithstanding Appellant's grouping of the claims, *Appellant incorporates by reference, and explicitly reserves the right to reassert, each and every ground set forth in any preceding Office Action response* to the extent needed to distinguish the invention from the prior art.

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(8) *Argument*

In summary of Appellant's supplemental argument on appeal, the teachings of Archibald et al. U.S. Patent 5,825,883, Knapton, III U.S. Pat. No. 6,363,486, Sobeski, U.S. Pat. No. 6,499,035, and Ahmad, U.S. Pat. No. 5,925,127, neither disclose nor suggest the claimed object usage-based software monitoring/billing scheme embodied in each of the currently pending claims involved in this appeal. The Office Action dated July 7, 2004, concedes that the Archibald reference neither discloses nor suggests a method (or program module) for charging customers for software usage according to *monitored customer use of object instances* created from an object class contained within a set of software modules previously distributed to the customer. The Office Action seeks to make up for the absence of teachings in Archibald regarding monitoring and charging for the use of objects by relying upon the combined teachings of the Knapton and Sobeski references. However, the Knapton reference merely identifies types of object-oriented programming languages. The Sobeski reference, in contrast to the claimed *monitoring/accounting* function, discloses a license manager that performs a gatekeeping/authorization/anti-pirating operation. Neither Knapton nor Sobeski disclose or suggest the modifications to Archibald needed to render the recited invention directed to monitoring use of objects and charging a customer based upon such monitored use. In view of the absence of relevant teachings regarding monitoring and charging for the use of software objects, all the currently pending claims should be allowed.

A. The §103 Rejection of claims 1-3, 5-7, 9-12, 14-25, 27-35, 37-40, 42-44, 53-55 and 74-77

Appellant traverses the rejection, in Sections 4 and 5 of the Office Action, of claims 1-3, 5-7, 9-12, 14-25, 27-35, 37-40, 42-44, 53-55 and 74-77 under 35 U.S.C. Section 103(a) as being unpatentable over Archibald U.S. Patent No. 5,825,883 in view of Knapton and Sobeski that, while disclosing objects, have nothing to do with charging a customer based upon the monitored use of objects. Appellant addresses each of the rejections in the order they arise in the Office Action.

Group I: Claims 1, 9-11, 18-22, 25, 29, 31, 35, 37, 39, 42, 43, and 44

The Office Action concedes that Archibald neither discloses nor suggests carrying out an *object* use-based customer charging scheme. The existence of object-oriented programming (Knapton) and regulating/licensing object usage on client systems (Sobeski) at the time Appellant conceived the current invention does not overcome the shortcomings of the Archibald reference and therefore does not support the obviousness conclusion reached

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within the Office Action. Appellant's claimed invention goes beyond merely reciting that customers are charged for using applications that contain objects. Instead, the claims recite that object instances are created from object classes that are distributed to customer systems. The customers are thereafter *charged in accordance with the monitored use of the created object instances*.

The teachings of the Sobeski reference do not concern charging a customer based upon monitored use of software. The Sobeski reference's disclosure is directed to a system for regulating/restricting/denying access to software. Sobeski discloses a license manager that (prospectively) sets a flag 206 (see, Col. 6, lines 13-17) associated with a Java object to ensure that only authorized Java objects are executed on a user's system. The Sobeski reference, describing only a software access mechanism, does not even remotely suggest charging users (retrospectively) based upon monitored use of the Java objects. Therefore, the combined teachings of Sobeski and Archibald do not, in combination, disclose or suggest the recited invention that is directed to *charging a customer based upon monitored execution of an object* on the customer's computer system.

Finally, Appellant traverses the stated basis for combining the references on page three of the Office Action. The Office Action states that the use of objects is obvious due to the cost and time savings associated with using object-oriented programming techniques. However, such factors relate to *programming*, not how objects affect charging customers based upon monitored use of the objects.

For purposes of the appeal, Appellant, for the reasons set forth hereinabove, likewise traverses the rejection of independent claims 31, 37, 42, and 53 (discussed separately herein below with reference to Group XIX) that are also directed to object-oriented program environment constructs that are neither disclosed nor suggested in Archibald. Appellant addresses the Office Action's individual grounds for the rejection of the dependent claims herein below.

Group II: Claim 2

Appellant has appealed the rejection of claim 2 that recites "a customer creates a number of instances from a software module, and use is measured according to instances detected" Archibald does not disclose monitoring the creation of instances (e.g., object instances created from an object class) of an item. Archibald does not even disclose creation of such instances. Instead, the cited portion of Archibald, at col. 6, lines 48-60, merely discloses a meter module

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generating use information (*i.e.*, *length of use*). The reference to "i.e., length of use" at line 55, not as an example, but rather as "in other words," does not suggest a use-based charging scheme based upon detecting created instances. It is further iterated that Archibald does not suggest making multiple copies of an instance and therefore there is no basis for Archibald incorporating a use measurement scheme that is based upon object-oriented "instances" created from the claimed object class.

Group III: Claim 3

Appellant has appealed the rejection of claim 3. Archibald discloses that usage information is determined. It does not disclose *how* that information is obtained. Nowhere does Archibald disclose instances created from a software module that are "periodically *accessed* to determine use." The Archibald does not disclose or suggest the recited element, and Appellant respectfully requests identification of where Archibald, at col. 12, lines 33-42, teaches periodically *accessing the instances* to determine their use.

Group IV: Claim 4 is addressed below in Section B.

Group V: Claim 5

With regard to the rejection of claim 5, Appellant agrees that Archibald contemplates a "trial use." However, Archibald does not disclose that the "trial use" option is associated with the recited "demonstration mode" of an object instance. In other words, the object instance has a particular mode of operation that is associated with a demonstration state for the object instance.

Group VI: Claim 6

Claim 6 recites "a single agreement governing use of instances" created from software modules. However, Archibald discloses a license that appears to apply to each downloaded copy of digital content rather than instances that are created from the downloaded digital content. Furthermore, the Office Action appears to be misconstruing the phrase "governing use of instances created from the set of software modules" in seeking to apply the disclosure of col. 7, lines 40-67 of Archibald to the claimed invention.

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Group VII: Claim 7

The rejection of claim 7 is appealed for at least the reason that Archibald does not disclose "instances *derived from a software-module*." Furthermore, Archibald teaches termination when an amount (rent to own price) is reached rather than a termination date.

Group VIII: Claims 8, 26 and 41 is addressed below in Section B.

Group IX: Claims 12, 32, 33, 74, 75 and 76

Appellant traverses the rejection of claims 12, 32, 33, 74, 75 and 76 for at least the reasons provided herein above regarding the independent claims, and furthermore because these claims recite specific bases (when an object is created/executed) for monitoring/charging for use of object instances created from a class object that are neither suggested nor disclosed in Archibald.

Group X: Claim 14

Appellant respectfully submits that, with regard to the rejection of claim 14 Archibald does not even disclose downloading an object class from which the specified objects are created/instantiated. Appellant specifically traverses the Office Action's assertion that "object classes" in general, and in particular "application engine objects" are disclosed or suggested by Archibald.

Group XI: Claim 15

Appellant respectfully submits that, with regard to the rejection of claim 15 Archibald does not even disclose downloading an object class from which the specified objects are created/instantiated. Appellant specifically traverses the Office Action's assertion that "object classes" in general, and in particular "view engine objects" are disclosed or suggested by Archibald.

Group XII: Claim 16

Appellant appeals the rejection of claim 16 in view of the previous amendment to the claim indicating that the monitored duration is that of an active object instantiated from the object class within the software module. Archibald does not disclose such object instances.

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Group XIII: Claims 17, 34, and 77

Appellant appeals the rejection of claims 17, 34 and 77. Each of these claims is directed to a particular monitoring implementation that comprises "registering execution of an instance that tracks throughput of a process" and this indirectly measures value created by a process that uses the software modules. Appellant respectfully submits that nothing in column 5, line 65 to col. 6, line 12 of Archibald (cited as the basis for rejecting the claims) even remotely discloses tracking process throughput or the particular method step recited in claim 17. The Office Action's further explanation does not address the "throughput of a process" element of claim 17.

Group XIV: Claim 23

Appellant traverses the rejection of claim 23. The claim element recites "identifying the location of an instance created from a software module" obtained by a customer. Appellant respectfully submits that Archibald, col. 10, lines 1-13 does not disclose identifying the location of an object instance created from a software module obtained by a customer. The subsequent explanation by the Office Action does not provide any further insight as to how Archibald discloses the recited elements of claim 23 pertaining to identifying a location of a software module.

Group XV: Claim 24

Appellant traverses the rejection of claim 24. Claim 24 is directed to a failure by a license manager (maintained at a customer's site) to communicate usage of software to a software brokerage. The failure is reported to a central licensing facility. In contrast, the Archibald reference discloses a failure by an authority (e.g., a software brokerage) to properly communicate to a customer site. Archibald's failure is a communication failure in the *opposite* direction of the element recited in claim 24.

Group XVI: Claims 27, 28 and 40

Appellant traverses the rejection of claims 27, 28 and 40. Archibald, at col. 2, lines 37-44 cited in the Office Action, does not disclose or even remotely imply that the downloaded software relates to industrial manufacturing (automation/information) software. If anything, Archibald suggests that the downloaded digital content comprises individual consumer items such as articles, music, books, individual consumer software, etc. – not the type of software utilized to run industrial processes and record data (information) from such processes.

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Group XVII: Claim 30

Appellant traverses the rejection of claim 30. In particular, though configuration tools were indeed well-known at the time of the invention, Appellant respectfully submits that the prior art (Knapton) shows the use of such tools in an environment that does not include a use-based customer charging scheme and therefore does not suggest providing such tools to customize instances created from software modules in a method that includes *charging a customer based upon monitored use of software modules*. In the event that this rejection is not withdrawn, Appellant requests provision of a reference showing such a teaching in the prior art.

Group XVIII: Claim 38

Appellant traverses the rejection of claim 38. Archibald, at col. 6, lines 33-47, cited in the Office Action, merely discloses use identification information (in the meter data file), but does not suggest that this file is used to *enable* operation of executable software nor that it is transmitted during an authorization step. Appellant further traverses the assertion that col. 11 – col. 12 of Archibald discloses the recited transmitting a license file enabling use of the software.

Group XIX: Claims 53-55

Turning to the rejection of claims 53-55, Appellant submits that the presently claimed invention comprises a defined article of manufacture wherein particular information is logically bundled within a single module that facilitates efficient and accurate marketing, distribution, and accounting of use by customers of software modules. Appellant traverses the rejection of claims 53-55 as obvious for at least the reason that Archibald does not disclose a single module containing the recited object class.

B. The §103 Rejection of claims 4, 8, 26, 36, and 41

Appellant furthermore traverses the rejection, in Section 6 of the Office Action, of claims 4, 8, 26, 36, and 41 under 35 U.S.C. Section 103(a) as being unpatentable over Archibald U.S. Patent No. 5,825,883 in view of Knapton, Sobeski and Ahmad.

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Group IV: Claims 4 and 36

With regard to the rejection of claim 4 and claim 36, Appellant traverses the rejection of claims 4 and 36 for at least the reason that the prior art does not disclose or suggest the object instance-based daily monitoring/charging steps recited in claims 4 and 36. The Ahmad reference mentions users renting software on an hourly or daily rate from a retail outlet (in a manner similar to renting a videotape of a movie) in column 1. In other words, Ahmad takes a "prospective" approach, and the software is disabled upon completing the rental period. However, Archibald debits a user's account based upon previous use. Thus, the Archibald reference discloses a "retrospective" approach to charging for use of software wherein a user is charged based upon actual use of software. Under such circumstances, there does not appear to be a need/suggestion to charge, in Archibald's system, on a "daily" basis – as opposed to a measured period of time that the software was actually used (analogous to a phone where you pay by the minute or connected call). The Office Action's statement at page 13 that "it is obvious to include charging the customer a daily rate for use of the software module in Archibald's for the purpose of time consuming" does not demonstrate any basis for incorporating Ahmad's disclosures concerning measuring daily usages of software into Archibald's system.

Group VIII: Claims 8, 26 and 41

Appellant objects to the rejection of claims 8, 26 and 41. While Ahmad does appear to disclose issuing a warning/reminder message, there is no suggestion that the disclosure in Ahmad is appropriate for incorporation into the Archibald system. In particular, the warnings in Ahmad are tied to upcoming endings of a period for which the software was rented – to ensure continued access by the user to the software when the initial period expires. Such warnings are not needed in Archibald since the user's account would merely be debited upon expiration of a unit of usage. In fact, Archibald's disclosed method, based on automatically debiting a pre-charged account, suggests just the opposite – not issuing such warnings. Thus, there is no suggestion to modify the system disclosed in Archibald to include warnings/reminders of the type disclosed in Ahmad.

(9) *The Appealed Claims*

The appealed claims are set forth in the Appendix attached hereto.